IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.266 of 2006

Decided on : April 16, 2007

Ramesh Chand @ Nikka **…..Appellant.**

VERSUS

State of H.P. **…..Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Baldev Singh, Advocate.

For the Respondent : Mr. Ashok Chaudhary, Additional Advocate General.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appellant has challenged the judgment of the Special Judge, whereby he has been convicted of an offence under Section 18(c) of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as the Act, and sentenced to undergo rigorous imprisonment for three and a half year and to pay a fine of Rs.25,000/- and in default of payment of fine to undergo simple imprisonment for a period of one year.

3. Case of the prosecution, as it emerges from the record, may be summed up thus. On 15.12.2003 when a police party, headed by PW-12 HC Sarbjeet Singh of CIA staff Una, went towards Mehatpur in connection with routine patrolling, Constable Upnesh Kumar, who was already in the area of Mehatpur, informed HC Sarbjeet Singh that the present appellant had in his house large quantity of opium and that if

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Whether the reporters of the local papers may be allowed to see the Judgment?

search was conducted immediately the same could be recovered. That information was reduced into writing and sent to the Police Station for formal registration of the case. A copy of that information was also forwarded to the Superintendent of Police, Una, he being the immediate superior Officer of PW-12 Sarbjeet Singh. Thereafter, two witnesses, namely PW-1 Avtar Singh and PW-10 Ram Pal, were associated as independent witnesses. PW-12 HC Sarbjeet Singh accompanied by the abovenamed two independent witnesses and PW-11 HHC Sher Bahadur went to the house of the appellant in village Sahoran. The appellant was found in the house. He was informed that his personal search and the search of his house were intended to be conducted. Thereafter, HC Sarbjeet Singh (PW-12) got his person searched from the appellant in the presence of the abovenamed two independent witnesses. Then he carried out the search of the house of the appellant. A refrigerator was found lying beside one of the walls of the kitchen and behind that refrigerator a plastic bag was found kept concealed. The bag contained opium, which on weighment was found to be 740 grams. The opium was seized. Search and seizure Memo. was prepared. Two samples, each weighing 10 grams, were separated from the recovered opium. The samples and the bulk opium were made up into separate parcels and the same were sealed. One of the samples was sent to the Chemical Examiner, who reported that the sample contained opium.

4. Appellant was sent up for trial. He was charged with an offence under Section 18(c) of the Act. On his pleading not guilty, he was tried and was ultimately convicted and sentenced, as aforesaid.

5. Learned counsel representing the appellant has submitted that the evidence regarding search and recovery is doubtful and does

not inspire confidence. His further submission is that mandatory provision of the proviso to sub Section (1) of Section 42 of the Act had not been complied with.

6. I have gone through the record and considered the aforesaid submission of the learned counsel, in the light of the evidence on record. As per prosecution version, search was conducted by PW-12 HC Sarbjeet Singh in the presence of two independent witnesses, namely PW-1 Avtar Singh and PW-10 Ram Pal. One of these two independent witnesses, namely PW-10 Ram Pal is involved in many criminal cases instituted against him by the Police therefore he cannot be termed an independent witness. Further both these witnesses are not from the locality where the search was carried out. PW-1 Avtar Singh is resident of village Badala, which is at a distance of 5-6 Kms. from Sahoran where the house of the appellant, which was searched, is situated. PW-10 Ram Pal is resident of Mehatpur, which is at a distance of 2-3 Kms. from the village of the appellant. The explanation put forward by the Investigating Officer in not associating any responsible person of the area is that though the house of the appellant is situated in a thickly populated segment of the village, no man was found available in any of the houses in the neighbourhood of the appellant and that only 2-3 old women were present whom he did not think to be right persons to be associated as search witnesses. The witness (PW-12 Sarbjeet Singh) admitted in the cross-examination that he had not prepared any record about this fact. The omission suggests that no effort was made to associate any witness from the neighbourhood of the appellant. Moreover, the fact that he associated PW-1 Avtar Singh and PW-10 Ram Pal well in advance at Mehatpur, where the information was

allegedly given to him by PW-9 Constable Upnesh Kumar suggests that he had even no intention to associate local witnesses, what to speak of his having attempted to do so.

7. In any case, the two non-official witnesses, namely PW-1 Avtar Singh and PW-10 Ram Pal, do not support the prosecution version. Both of them have denied that the house of the appellant was searched in their presence and opium was recovered. PW-12 Sarbjeet Singh stated that he carried out the search in the presence of the abovesaid two non-official witnesses and PW-11 HHC Sher Bahadur. But, PW-11 Sher Bahadur says that he had not gone inside the kitchen where the search was conducted and opium was allegedly found lying behind a refrigerator. He says that he remained outside the house of the appellant. Site plan Ex. PW-12/B shows that the refrigerator from behind which the opium was allegedly recovered is not visible if someone is present outside the house or even outside the door of the kitchen, because the door of the kitchen is in the eastern wall while the refrigerator was lying beside the northern wall in the middle. Thus, the testimony of PW-12 is contradicted, as regards the persons in whose presence the search was conducted, even by an official witness of the Police Department, namely PW-11 Sher Bahadur.

8. It has come in the evidence that the search was conducted at 5.45 p.m. Reference in this behalf may be made to the search and seizure Memo. Ex. PW-11/C. The date of search is 15.12.2003. In mid December, sun sets around 5.25 p.m. In any case, the sunset takes place in mid December, before 5.30 p.m. That means the search was conducted after sunset. However, no reasons for the belief that a search warrant or authorization cannot be obtained without affording

opportunity for the concealment of evidence or facility for the escape of the offender were recorded by PW-12 Sarbjeet Singh to meet the mandatory requirement of proviso to sub-Section (1) of Section 42 of the Act. Thus, there is violation of mandatory provision of proviso to sub-Section (1) of Section 42 of the Act. Not only that no reasons for such belief were recorded but even while leading evidence the prosecution made no effort to show that in fact there was possibility of concealment of evidence or facility for the escape of the offender if time was spent on obtaining search warrant or authorization for carrying out the search after sunset. A Constitution Bench of the Hon'ble Supreme Court in *State of Punjab v. Baldev Singh, (1999) 6 Supreme Court Cases 172*, has held that compliance of proviso to sub-Section (1) of Section 42 of the Act is mandatory and its non-compliance renders the entire prosecution case suspect and causes prejudice to the accused. In *State of W.B. and others v. Babu Chakraborthy, (2004) 12 Supreme Court Cases 201*, where search was conducted after sunset and before sunrise without complying with the requirement of proviso to sub-Section (1) of Section 42 of the Act, regarding the recording of reasons for the belief that obtaining of search warrant or authorization would afford an opportunity for the concealment of the evidence or facility for the escape of the offender, it was held that proviso to sub-Section (1) of Section 42 of the Act is mandatory and its non-compliance causes prejudice to the accused.

9. In view of the above discussed evidence of the prosecution coupled with the fact that the proviso to sub-Section (1) of Section 42 of the Act had not been complied with, it is held that the sole testimony of PW-12 Sarbjeet Singh is not sufficient to hold that opium, in question,

was recovered in the course of the search of the house of the appellant. Consequently, the appeal is accepted. The judgment of the trial Court convicting and sentencing the appellant for an offence under Section 18(c) of the Act is set aside. The appellant, being in jail, is ordered to be released immediately in case his detention is not required in connection with any other case.

April 16, 2007(sd) **(Surjit Singh), J.**